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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 993

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, *ET AL.*,
Petitioners,

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Radio Television News Directors Association, *et al.* (RTNDA),[1] Columbia Broadcasting System, Inc. (CBS), and National Broadcasting Company, Inc. (NBC) seek a writ of certiorari before judgment in the United States Court of Appeals for the Seventh Circuit.

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[1]RTNDA's eight co-petitioners, who are licensees of radio and television stations located throughout the United States, are Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc.

OPINIONS BELOW

There has been no judgment or opinion of the United States Court of Appeals for the Seventh Circuit. The July 5, 1967, and August 2, 1967, memorandum opinions and orders of the Federal Communications Commission (Appen. A, *infra*, pp. 1a-18a; Ra. 346-57; Appen. B, *infra*, pp. 19a-24a; Ra. 358-61)[2] are officially reported at 8 F. C. C. 2d 721, and 9 F. C. C. 2d 539. They are unofficially reported at 10 Pike & Fischer, R. R. 2d 1901, and 10 Pike & Fischer, R. R. 2d 1911.

JURISDICTION

The memorandum opinions and orders of the Federal Communications Commission under review were entered on July 5, 1967, and August 2, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1), 28 U. S. C. § 2101(e) and Rule 20 of the Rules of this Court.[3]

QUESTIONS PRESENTED

1. Whether every television or radio station that broadcasts a statement by any person attacking the "honesty, character, integrity or like personal qualities" of any individual or group during programs about controversial issues of public importance may, consistently with the Communications Act and the First Amendment, be required by the

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[2] "R. " references are to the certified record in the court of appeals. "Ra. " references are to the record before the Federal Communications Commission filed in the Seventh Circuit. "Rb. " and "Rc. " references are to the certified Second Circuit records in the CBS and NBC cases, respectively (containing the record made in those cases before they were transferred to the Seventh Circuit). See, *infra*, p. 7. References to "Appen. " are to the appendices to this petition.

[3] A discussion of the jurisdictional issue in this case appears, *infra*, at pp. 14-17.

Federal Communications Commission to notify the individual or group "attacked," furnish a tape, script or summary of the "attack" and offer free broadcast time for reply.

2. Whether, consistently with the Communications Act and the First Amendment, every television or radio station that broadcasts an editorial supporting or opposing a political candidate may be required by the Federal Communications Commission to give notice to disfavored candidates, furnish a copy of the editorial and offer free broadcast time for reply.

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The constitutional provisions, statutes, and rule involved are the First Amendment to the United States Constitution, Sections 315 and 326 of the Communications Act of 1934, as amended, 47 U. S. C. §§ 315 and 326, Section 1254(1) of the Judicial Code, 28 U. S. C. § 1254(1), and Rule 20 of the Rules of this Court. These provisions are set forth as Appendix C to this petition.

STATEMENT

This case presents important questions as to whether the "personal attack" and "political editorial" regulations of the Federal Communications Commission (the "Commission"), which purport to expand and strengthen its earlier policies on these subjects, offend the First Amendment and exceed the Commission's statutory authority.

A challenge to the Commission's personal attack policy is now before the Court on review of a Commission order applying the policy to a single broadcast by a single station. No. 600, this Term, *Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D. C. Cir.), *certiorari granted*, 36 U. S. Law Week 3226 (Dec. 4, 1967). The instant case presents the

same and other questions on review of new rules issued by the Commission after its order in *Red Lion,* purporting to codify its "personal attack" policy and applying new sanctions against any station that violates the rules. The importance of these issues and the close relationship of this case with *Red Lion* have been conceded by the Government.[4]

The rules at issue in this case require that if any radio or television station broadcasts an "attack . . . upon the honesty, character, integrity or like personal qualities of an identified person or group" during the presentation of views on a controversial issue of public importance, the station must afford notice to the individual or group attacked, furnish a tape, script or, if no tape or script is available, a summary of the attack, and supply broadcast time for reply.[5] The rules also create a right to notice and opportunity for reply to editorials by a broadcast licensee in favor of or in opposition to candidates for public office.

The personal attack sections of the rules, like the Commission's earlier less formal policy, apply not only when the station's own staff initiates a "personal attack," but also when the station broadcasts the newsworthy remarks of third persons concerning the honesty, character, integrity and other qualities of persons in the public eye.

The rules apply to criticisms of public officials and other public figures that are constitutionally privileged under the doctrine of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and *Curtis Publishing Co.* v. *Butts,* 388 U. S.

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[4]Brief for Respondents In Opposition, *Red Lion Broadcasting Co.* v. *FCC,* No. 600, this Term, p. 9; Respondents' Motion to Hold Petitions for Review in Abeyance, filed below in the Seventh Circuit, p. 3; R. 42.

[5]The Commission stated in its July 5, 1967, memorandum opinion and order that "Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time." Appen. A, p. 11a n. 8, Ra. 353 n. 8. For the governing rule on this issue it referred to its ruling in *Red Lion* that an offer of free time was required if the person or group "attacked" declined to pay.

130 (1967). The rules apply even when the statement constituting the attack is true, and even when the statement, although false, is broadcast in the good faith belief that it is true. They also apply even though the station's broadcasts dealing with the underlying public issue have stated all sides fully and fairly. They apply even though the station may recently have broadcast an interview with the subject of the "attack" in which he presented his side of the matter. They apply even though the station, promptly after the "attack", broadcasts the text of the subject's response without permitting the subject himself to appear. Only an offer made *after* the "attack" for a *subsequent* and *personal* appearance by the subject or his designated spokesman satisfies the requirements of the rules.

These rules were adopted after a formal rule making proceeding before the Commission. The proceeding was commenced on April 6, 1966, when the Commission issued a notice of proposed rule making inviting comments on a series of proposed personal attack and political editorial rules.[6] Comments were filed by a number of interested parties, including the petitioners. With a few exceptions, the broadcaster comments urged that the proposed rules and the earlier less formal policy on which they were based imposed such heavy burdens on the broadcast of public affairs programs as to deter licensees from making them.[7] For this and other reasons, a number of the comments chal-

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[6] 31 Fed Reg. 5710; Ra. 1-6.

[7] See the comments of Carroll M. Barringer (WLCO) (Ra. 113, 115-16); Bedford Broadcasting Corp., *et al.* (Ra. 123, 136-42) Cape Fear Telecasting, Inc. (Ra. 118, 121); Columbia Broadcasting System, Inc. (Ra. 102, 105-06); Corinthian Television Corp., *et al.* (Ra. 233, 238); Griffin Leake TV, Inc. (Ra. 215, 217-19); Interstate Broadcasting Co. (Ra. 67, 75-77); Mutual Broadcasting System, Inc. (Ra. 62, 64); National Association of Broadcasters (Ra. 48, 56-59); Storer Broadcasting Co. (Ra. 45, 46-47); WPSD TV (Ra. 17, 18). Altogether 18 of the 26 groups or individuals who filed comments with the Commission opposed the new rules.

lenged the Commission's constitutional and statutory authority to adopt the rules.[8]

On July 5, 1967, the Commission issued a memorandum opinion and order adopting the rules (effective August 14, 1967) substantially as proposed with Commissioner Bartley dissenting, and Commissioner Loevinger concurring separately.[9] The Commission majority relied heavily on the court of appeals decision in *Red Lion* and concluded in a lengthy opinion that the rules were not unconstitutional or otherwise unlawful. Appen. A, pp. 4a-5a, 13a; Ra. 348-49, 354.

On August 2, 1967, the Commission issued a supplementary memorandum opinion and order amending the proposed rules to exempt "bona fide newscasts" and "on-the-spot coverage of bona fide news events."[10] Appen. B, pp. 19a-24a; Ra. 358-61. The Commission's stated reason was that coverage of news events would be unreasonably impeded if time had to be devoted to replies to personal attacks occurring on prior news programs. Appen. B, p. 20a; Ra. 359. However, the Commission drew a sharp distinction between "hard news" programs and news-related programs such as news documentaries, news interviews and "editorials or similar commentary . . . broadcast in the course of . . . newscasts," and made the new rules speci-

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[8]See the comments of Bedford Broadcasting Corp., *et al.* (Ra. 123, 180-85); Columbia Broadcasting System, Inc. (Ra. 102, 104-06); Corinthian Television Corp., *et al.* (Ra. 233, 235-40); Griffin Leake TV, Inc. (Ra. 215, 217); Mutual Broadcasting System, Inc. (Ra. 62, 63-64). See also the comments of the National Association of Broadcasters (Ra. 48, 53-59). Several comments supported the Commission's constitutional authority to adopt the rules. International Typographical Union (Ra. 13-14); United Steelworkers (Ra. 251, 254-55).

[9]Appen. A, pp. 1a-18a; Ra. 346-57.

[10]The Commission concluded that such programs were nevertheless subject to the "general fairness doctrine." Appen. B, p. 20a; Ra. 358.

fically applicable to such news-related programs.[11] Appen. B, p. 31a; Ra. 359.

On July 27, 1967, petitioners Radio Television News Directors Association, *et al.* (RTNDA) (R. 1-19) and Columbia Broadcasting System, Inc. (CBS) (Rb. 2-24) sought review of the Commission's orders in the United States Court of Appeals for the Seventh and Second Circuits, respectively, challenging the new rules on the grounds that they are unlawful under the First Amendment and the Communications Act (particularly Sections 315 and 326, as amended, 47 U. S. C. §§ 315, 326).[12] On August 31, 1967, petitioner National Broadcasting Co., Inc. (NBC) sought review on similar grounds in the Second Circuit (Rc. 2-27).

The CBS and NBC petitions were transferred to the Seventh Circuit pursuant to 28 U. S. C. § 2112 (Rb. 41 and Rc. 34) and were consolidated for hearing together with the RTNDA petition for review (R. 39).[13] After petitioners filed their brief, respondents, before filing their own brief, moved to stay further proceedings in the Seventh

[11]As in its original opinion, the Commission emphasized that licensees who "choose" to include personal attacks on such programs must accept the burden of complying with the rules. The Commission concluded (Appen. B, p. 21a; Ra. 359):

> "since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked."

[12]Supplemental petitions for review were filed by petitioners RTNDA (R. 20-26) and CBS (Rb. 27-35) to take account of the issues raised by the Commission's August 2, 1967, amendment to its rules.

[13]The Seventh Circuit has jurisdiction of this case under Section 2 of the Judicial Review Act of 1950, as amended, 28 U. S. C. (Supp. II) § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U. S. C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U. S. C. § 704.

Circuit pending this Court's decision in *Red Lion* (R. 40-44). At petitioners' suggestion, and based on their representation that they intended to file this petition for certiorari promptly, the Seventh Circuit on January 2, 1968, deferred respondents' time to file briefs until 30 days after disposition of this petition (R. 50-51).

Petitioners seek certiorari in this case before judgment in the court of appeals pursuant to 28 U. S. C. § 1254(1) and Rule 20 of the Rules of this Court.

REASONS FOR GRANTING THE WRIT

I.

The formal rules challenged in this case present critical questions concerning the power of the Commission to regulate the freedom of radio and television broadcasters to present discussion of controversial issues of high public importance. The significance of the issues is conceded. An earlier, specific application of the personal attack doctrine on which the rules are predicated is already before the Court in *Red Lion Broadcasting Co.* v. *FCC*, No. 600, this Term, *certiorari granted*, December 4, 1967.[14]

This petition for certiorari before judgment is being filed to provide this Court with an opportunity to hear and decide this challenge to the formal rules along with *Red Lion*. Granting the writ would be of immeasurable value

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[14]The petitioners' briefs in that case are due on January 26, 1968. Respondents' brief is due on February 25, 1968.

Petitioners CBS and NBC filed briefs amicus curiae suggesting that the petition in *Red Lion* be held pending decision of this case by the Seventh Circuit so that the two related proceedings could be considered together by this Court. In granting certiorari in *Red Lion* and scheduling it for argument in the normal course, this Court said nothing which would foreclose other possible methods of bringing this case before this Court for consideration together with *Red Lion*.

to all who engage in broadcast journalism or rely upon it for information and also, we believe, of great assistance to this Court in considering *Red Lion.*

1. Respondents have represented that the instant case presents "the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion* . . . ." Respondents' Motion to Hold Petitions for Review in Abeyance (7th Cir.), p. 3; R. 42. We agree with this view to the extent that if *Red Lion* were decided in favor of the broadcaster petitioners, the same result should follow in the instant case. But this case contains additional elements requiring consideration at the same time the "fundamental issues" are determined in *Red Lion.* It is the rules challenged in the instant case that state the current obligations of all broadcasters under the personal attack doctrine. The rules also involve closely related applications of the basic "fairness" principle which are not presented in the *Red Lion* case, but which help to illuminate the constitutional issues raised by *Red Lion.*

First, in *Red Lion* the only ruling involved is a specific Commission directive, issued after the fact, to allow a named individual broadcast time to respond to a specific and previously broadcast program. But the principal inhibitory effect upon speech is felt at the time programs are selected and scripts are prepared, when the broadcaster has only the rules or other expressions of the policy before him and not the specificity of a particular after-the-fact directive. A major constitutional objection to the policy, aggravated by the vague and encompassing language in which the rules are cast, is that broadcasters are impelled to engage in self-censorship, steering wide of the dangerous zone because of the burdens imposed as well as the uncertainty as to the circumstances in which they apply. It is doubtful

whether this fundamental aspect of the problem can be fully considered in the *Red Lion* case where only a specific after-the-fact ruling is in issue.

Second, the only formal sanction for violation of the order at issue in *Red Lion* is for the Commission to deny renewal of Red Lion's license when it expires. Violation of the new rules challenged in the present case invokes possible liability for civil forfeitures, criminal fines, and cease and desist orders, in addition to loss of license. The rules were adopted expressly to promote more vigorous enforcement of the "personal attack" policy.[15] The difference is important here because the wider range of sanctions makes it more likely that one or more will be invoked, thus giving the rules a more chilling effect upon the broadcast discussion of public issues. Moreover, the First Amendment may require greater specificity in regulations enforceable by immediate criminal penalties. While we submit that the threat of loss of license brings all the First Amendment safeguards into play, the impact of these additional sanctions should also be before the Court when the basic constitutional issues are considered.

Third, the Commission's rules require every radio or television station that broadcasts an editorial supporting or opposing a political candidate to notify each disfavored candidate, supply a copy of the editorial, and offer free broadcast time for reply. The inhibiting effect upon editorial endorsements, particularly in multi-candidate elections, is obvious. The constitutionality and statutory

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[15]The Commission in its July 5, 1967, Memorandum Opinion and Order (Appen. A, pp. 6a-7a; Ra. 350) noted that "Despite such notification [in policy statements by the Commission] and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

legality of this restraint upon the freedom of electronic journalism ought to be considered along with the "personal attack" issues because doing so would add a new dimension to the Court's inquiry into the rationale and consequences of the Commission's action.

2. The impact of the Commission's personal attack doctrine will not be confined to licensees of "extremist" political persuasion. Its chilling effect will be felt by all broadcast journalists.

For example, the rules apply to all editorial commentaries, news interviews and news documentaries. The Eric Sevareid editorial commentaries broadcast during the year ending October 12, 1967, by some 400 stations affiliated with the CBS radio and television networks contained more than 50 statements that at least arguably were "personal attacks." The weekly *Face the Nation*[16] news interview programs broadcast by the same stations from March 1966 to October 1967 contained 75 or more statements that at least arguably were "personal attacks." Numerous statements at least arguably "personal attacks" were also contained in recent CBS news documentary programs, as might be surmised from the titles of these programs alone ("Black Power—White Backlash," "Murder and the Right to Bear Arms,"

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[16]As noted above, the Commission has exempted "hard news" programs from the rules, but has specifically applied them to news interview, editorial and documentary programs. The slippery and untenable nature of this distinction is illustrated by the fact that 58 of the 85 weekly *Face the Nation* programs broadcast in the 20 months ending in November 1967 resulted in New York Times or Washington Post news stories the following day. Nineteen of the programs created front page stories in the Times or Post or both. NBC's *Meet the Press* has been equally creative in making news. Perhaps the ultimate absurdity is that a statement made in a *Meet the Press* or *Face the Nation* program is subject to the personal attack rules when first broadcast on Sunday afternoon, but is exempt from the rules when repeated as part of a "bona fide newscast" broadcast the same evening.

"The New Left," "The Warren Report," "Robert F. Kennedy," "Civil Rights: The View From the South").[17]

It will be impracticable for any network or station or the broadcast journalists who prepare and conduct these programs to continue doing so if every statement arguably constituting an "attack" obliges the network and station to find and notify the individual or group mentioned, furnish a tape, script or summary of the attack and, if the offer of reply time is accepted, displace some other scheduled program or program material to provide the necessary time. The networks, stations and journalists concerned will have to choose between eliminating the offending statements from the programs—thus sapping their journalistic vigor and integrity—and abandoning entirely presentation of significant news editorial, interview and documentary discussions of public issues via the broadcast medium.

For some stations, the sheer economic impact of providing free time and processing personal attack claims may prove insuperable. But even for the larger broadcast operations, the practical burdens are of great moment, and will have a significant inhibitory effect.

Resolution of the legality of the Commission's new rules is particularly important early in this Presidential and Congressional election year, when requests under the Commission's rules for reply time to attacks on editorials involving candidates, prospective candidates, public officials and other public figures can be expected to multiply.[18] For

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[17]For the text of these "attacks" and a more detailed description of the problems which would be encountered in providing reply time see the CBS brief (pp. 23-42) and Exhibit filed in the Seventh Circuit. Copies of the CBS brief and Exhibit in the Seventh Circuit were filed with this Court at the time that it was considering the petition for certiorari in *Red Lion*.

[18]See *New York Times*, December 22, 1967, p. 30, col. 3 (commentary by James Reston).

example, on December 20, 1967, a spokesman for Senator Eugene McCarthy demanded that CBS, NBC and ABC afford Senator McCarthy time to reply to an alleged personal attack made by President Johnson in a television interview on December 19, 1967.[19] When the networks declined, Senator McCarthy filed a complaint with the Commission. A large number of requests from candidates can also be expected under the political editorial sections of the rules.[20] The constitutionality and enforceability of the new rules will be repeatedly at issue until their validity is authoritatively decided by this Court.

3. The instant case presents a more complete record than the bare exchange of letters giving rise to the *Red Lion* litigation, because it results from a formal rule making proceeding and shows the anticipated effect of the Commission's rules on all broadcast journalism.

The constitutional questions presented are both novel and fundamental. The decision will have major impact not only upon the entire broadcasting industry but, more importantly, upon the vigor and quality of the discussion of public affairs in the United States. It is of the utmost importance, we submit, that all major facets of the question be fairly before the Court and that more than one representative of broadcast journalism be heard when the key decision is rendered.

4. Since this case is closely related and complementary to *Red Lion,* we urge that certiorari before judgment in

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[19]The President referred to "the Kennedy-McCarthy movement" and stated:

> "I just observe they have had some meetings and some discussions. I do know the interest of both of them in the Presidency and the ambition of both of them. I see that reflected from time to time."

[20]*Cf.* Brief Amicus Curiae on Behalf of King Broadcasting Co. filed below in the Seventh Circuit.

the court of appeals is appropriate. On numerous occasions this Court has granted certiorari before judgment in order to bring cases before it for consideration together with pending related proceedings.[21]

II.

1. The jurisdiction of the Court to entertain this petition requires brief discussion. The question of whether it would be a constitutional exercise of "appellate" jurisdiction for this Court to grant certiorari before judgment in a case that has reached the court of appeals directly from a federal administrative agency does not appear to have been decided.[22]

We submit that the initial judicial review of agency action is an exercise of appellate rather than original juris-

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[21]For example, in *Porter* v. *Dicken*, 328 U. S. 252 (1946), this Court granted certiorari before judgment in a case which presented issues similar to those raised in the pending case of *Porter* v. *Lee*, 328 U. S. 246 (1946). Both actions involved the jurisdiction of the Federal district court to restrain eviction of tenants under a state court order allegedly in violation of the Emergency Price Control Act. The Court explained that it was "prompted to bring the District Court's judgment directly to this Court for review by reason of the close relationship of the important question raised to the question presented in *Porter* v. *Lee* . . . ." *Id.* at 254. See *McCulloch* v. *Sociedad Nacional*, 372 U. S. 10, 12 (1963); *Hannah* v. *Larche*, 363 U. S. 420, 422 n. 3 (1960); *United States* v. *Thomas*, 361 U. S. 950 (1960); *McElroy* v. *Guagliardo*, 361 U. S. 281, 283 (1960); *Taylor* v. *McElroy*, 360 U. S. 709, 710 (1959); *Reid* v. *Covert*, 354 U. S. 1, 5 (1956); *Bolling* v. *Sharpe*, 347 U. S. 497, 498 (1954); *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 243 (1935); *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 411-12, 415 n. 2 (1931); *Johnson* v. *Fleet Corporation*, 280 U. S. 320, 324-25 (1930). See also *Brown* v. *Board of Education*, 344 U. S. 1, 3 (1952) (Court took judicial notice of *Bolling* v. *Sharpe*, then pending in the court of appeals, and invited a petition for certiorari before judgment in order to consider similar constitutional issues).

[22]See STERN AND GRESSMAN, SUPREME COURT PRACTICE, pp. 20-21 (3rd ed. 1962); ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 132 (Wolfson & Kurland ed. 1951).

The argument against such jurisdiction rests on the premise that, in certiorari before judgment, the Supreme Court is exercising direct

diction, regardless of whether the review is conducted in the first instance by the court of appeals or by this Court on certiorari before judgment in the court of appeals.

The basic test of appellate jurisdiction was stated by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175 (1803):

> "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

In reviewing decisions of the Federal Communications Commission, the courts of appeals perform an appellate function in a "cause already instituted" before the Commission.

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review over the agency. *Cf. United States* v. *Rice*, 327 U. S. 742, 747 (1946); *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U. S. 572, 576 (1930). But as stated in the text, we submit that when judicial review of agency action rests upon a statutory plan requiring that questions of law initially be resolved by the agency before being reviewed in a court, the initial review by the court may properly be deemed the exercise of appellate jurisdiction. See STERN AND GRESSMAN, *supra*, pp. 20-21.

The jurisdictional problem was discussed in the petition for certiorari in *International Ass'n of Machinists* v. *NLRB*, 361 U. S. 881 (1959), which sought certiorari before judgment in a court of appeals proceeding to review an NLRB order. Certiorari was denied without comment, and other considerations may well have dictated this action by the Court. In *Ickes* v. *Associated Industries*, 319 U. S. 739 (1943), the Court granted certiorari before judgment in a federal agency case, but there the court of appeals had entered an interim order which was the subject of this Court's review.

In *Ex parte Vallandigham*, 1 Wall. (68 U.S.) 243 (1864), this Court indicated that it had no power to review proceedings of a military commission by certiorari because this would constitute an exercise of original jurisdiction. A military commission is hardly comparable to an adminstrative agency granted quasi-judicial powers by Act of Congress, and subject to a specific statutory procedure for judicial review of a limited and essentially appellate nature. In any event this and other issues relating to the Court's jurisdiction over military tribunals were treated as open questions in a series of cases in which original habeas corpus was sought to review convictions of the international war crimes tribunals in World War II. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953), pp. 284-87; Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

The fact that Congress has made Commission orders reviewable in the courts of appeals rather than the district courts and the manner Congress chose to do so confirm that this review is appellate rather than original in nature. Previously Section 402(a) of the Communications Act of 1934, 48 Stat. 1093, incorporated the review provisions of the Urgent Deficiencies Act of 1913, 38 Stat. 219, which provided for a trial *de novo* in a three-judge district court with direct appeal to the Supreme Court. In 1950 Congress repealed that statute and vested review in the courts of appeals of Commission orders of the type here involved. 64 Stat. 1129 (1950). On review, the court of appeals is limited to the record before the agency (28 U. S. C. (Supp. II) § 2347)[23] and may not consider any questions of law or fact not presented to the agency. See 47 U. S. C. § 405.

Where, as here, the question of the agency's power is raised, this issue must first be raised before the Commission, and the Commission decides in the first instance the constitutionality and statutory validity of the action it proposes to take. If the court of appeals finds that the Commission erred in interpreting or applying its power, the court cannot go on to promulgate some different order; as in most appellate review it can only return the matter to the Commission for further action consistent with the judgment of the court. *FPC* v. *Idaho Power Co.*, 344 U. S. 17 (1952); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940).[24]

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[23] If there is a need to supplement the record, the proceeding is sent to a district court or is remanded to the agency for this purpose. 28 U. S. C. (Supp. II) § 2347(b) and (c).

[24] It is clearly irrelevant that the Commission performs non-judicial functions as well as judicial functions for it is the nature of the decision in question rather than the character of the tribunal which is determinative. See STERN AND GRESSMAN, *supra*, pp. 20-21.

This Court has frequently reviewed judicial decisions of non-Article III tribunals even though those tribunals also carried on activities which were clearly non-judicial in nature. See *Pope* v. *United States*, 323 U. S. 1, 12-13 (1944). See also *O'Donoghue* v. *United States*, 289 U. S. 516, 546 (1933); *Williams* v. *United States*, 289 U. S. 563, 564 (1933).

Thus, when a party before the Commission files a petition to review the legality of the Commission's order, it is asking the court of appeals to conduct an appellate, not an original, review of the Commission's actions. Compare *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464 (1930), with *Federal Radio Commission* v. *Nelson Brothers Co.*, 289 U. S. 266 (1933). Compare *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693 (1927), with *Brenner* v. *Manson*, 383 U. S. 519 (1966). See also *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956); *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407 (1942). In such a case, we submit that review by this Court on certiorari before judgment is no less appellate in character.

A contrary ruling would mean that, notwithstanding the gravity and urgency of the issues involved, Congress could not constitutionally authorize this Court to conduct direct review of administrative agency action, even in circumstances where the national interest plainly required a prompt and authoritative decision. Nothing in the Constitution requires such an impracticable, if not paralyzing, limitation on the legislative and judicial powers.[25]

2. Decision of certified questions in this case would clearly be a constitutional exercise of appellate jurisdic-

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[25]Congress has conferred on this Court statutory power to grant certiorari before judgment in the broadest possible terms. Title 28 U. S. C., Section 1254(1) covers all types of cases pending in courts of appeals, including petitions to review agency orders. While Section 10 of the Judicial Review Act of 1950, 28 U. S. C. (Supp. II) § 2350, refers specifically only to certiorari review of injunctions and final judgments in cases involving agency orders, this and similar statutes providing for review by certiorari of agency action "are merely cumulative, and do not in any way broaden or restrict the provisions of 28 U. S. C. § 1254(1)." ROBERTSON & KIRKHAM, *supra*, § 129 at 231; STERN AND GRESSMAN, *supra*, at 18. See also *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 144 (1967), construing agency statutes authorizing judicial review of certain classes of orders as not precluding judicial review of other agency orders.

tion,[26] and is expressly authorized in agency review cases by Section 10 of the Judicial Review Act of 1950, 28 U. S. C. (Supp. II) § 2350, which incorporates the general provisions of 28 U. S. C. § 1254(3). Accordingly, if this Court should be disposed to hear this case on the merits but should have doubt as to its jurisdiction to grant certiorari before judgment, we respectfully suggest that this Court either set the jurisdictional issue for briefing and oral argument together with the merits, or else deny certiorari in an order stating that denial is without prejudice to an immediate application to the Seventh Circuit for certification of the issues to this Court.[27]

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[26] *United States* v. *Rice*, 327 U. S. 742, 747 (1946); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942); *Wheeler Lumber Bridge & Supply Co.* v. *United States*, 281 U. S. 572, 576 (1930); *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 728-29 (1929).

[27] Compare *Wisniewski* v. *United States*, 353 U. S. 901, 902 (1957), in which this Court concluded that certification, while inappropriate in most cases, is appropriate in "rare instances, as for example [in situations involving] the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business."

CONCLUSION

For the reasons set forth above this petition for a writ of certiorari should be granted, and the case should be set for argument together with No. 600, this Term, *Red Lion Broadcasting Co.* v. *FCC*. If the Court grants certiorari, petitioners are prepared to conform to any briefing schedule necessary to have this case heard this Term, including, if necessary, reliance on their Seventh Circuit briefs as their initial briefs in this Court.

Respectfully submitted,

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